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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 176

FRANK C. MITCHELL, PETITIONER,

vs.

TRAWLER RACER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JULY 2, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

SUPREME COURT OF THE UNITED STATES

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No. 5429.

United States Court of Appeals
For the First Circuit

FRANK C. MITCHELL,

PLAINTIFF, APPELLANT,

v.

TRAWLER RACER, INC.,

DEFENDANT, APPELLEE.

RECORD APPENDIX
TO
BRIEF FOR THE APPELLANT

Blanchard Printing Company, Boston, Mass. — Law Printers

C.A. 57-752-W

FRANK C. MITCHELL

v.

TRAWLER RACER, INC.

DOCKET ENTRIES

1957

Aug.	6	Complaint filed. Summons issued. Seaman's affidavit attached hereto.
	13	Marshal's return of summons with service on August 7, 1957.
Sept.	3	Defendant's answer, filed. c/s
Dec.	24	Deft's interrogatories to Pltf., filed. c/s

1958

Feb.	21	Request for 20-day order, filed. (letter form) 20-day order issued. Copies to counsel.
Mar.	12	Pltf's motion for extension of time in which to answer the deft's interrogatories to & including April 30, 1958, assented to & filed.
	27	Pltf's interrogatories to defendant, filed. c/s
	31	Pltf's answers to interrogatories by the defendant, filed. c/s.
Apr.	18	Pltf's motion to inspect & Copy, filed. c/s
	18	Pltf's application for order requiring deft., to answer interrogatories, filed. 20-day order issued copies to Attys. Katz, & Whipple.
	23	WYZANSKI, J. Hearing on deft's motion to inspect and copy. Motion allowed—except as to statement & reports made to attorneys.
	25	Deft's answers to pltf's interrogatories, filed. c/s
Sept.	11	Deft's motion to amend deft's answer filed. c/s Plaintiff's Motion to amend complaint, filed.

19 WYZANSKI, J. Hearing on pltf's motion to amend his complaint. Motion allowed.
WYZANSKI, J. Hearing on deft's motion to amend his answer. Motion allowed.

1958

30 WYZANSKI, J. Trial with jury begins—evidence—adjourned until Oct. 1—at 10 A.M.

Oct. 1 WYZANSKI, J. Jury trial continues—evidence—Deft's motion for directed verdict. Motion denied Deft's motion for further instructions to jury—Motion denied. Jury returned verdict for the defendant in Counts I and II and for Plaintiff on Count III in the amount of $2500.00.

2 WYZANSKI, J. "After trial and in accordance with the verdict of the jury, it is ORDERED judgment for the defendant on Counts I and II of the complaint and judgment for the plaintiff on Count III of the complaint in the amount of $2500, minus $282.00 heretofore paid." Judgment entered. Copies to Messrs. Katz and Whipple.

17 Notice of Appeal filed by the plaintiff, Frank C. Mitchell from that portion of the Judgment entered on October 2, 1958 relating to Count II of the Plaintiff's Amended Complaint. Copy to counsel.

PLAINTIFF'S AMENDED COMPLAINT

Now comes the plaintiff in the above-entitled action and says:

COUNT I.

First: The plaintiff is a resident of Reading, within the District of Massachusetts, a seaman and fisherman, and

at the time hereinafter referred to a member of the crew of the fishing vessel RACER.

Second: The defendant was and still is a corporation duly organized under the laws of the Commonwealth of Massachusetts, having its principal place of business in the City of Boston, within the District of Massachusetts, and at the time hereinafter referred to owned, operated and controlled the fishing vessel RACER.

Third: On or about April 1, 1957, the plaintiff was in the employ of the defendant as a seaman and fisherman on the fishing vessel RACER.

Fourth: On or about April 1, 1957, while the said fishing vessel was in navigable waters at the Fish Pier, Boston, Massachusetts, and while the plaintiff was in the exercise of due care in the performance of his duties, he received severe and painful personal injuries of a permanent nature.

Fifth: The injuries received by the plaintiff were not caused by any fault on his part but were caused by the fault of the defendant, its agents or servants, as follows:

(a) Failure to use due care to provide and maintain a seaworthy vessel with safe and proper appliances.

(b) Failure to use due care to make reasonable and periodic inspection of the said vessel, its equipment and appliances.

(c) Failure to use due care to furnish the plaintiff with a reasonably safe place in which to perform his work.

(d) Failure and negligence of fellow employees.

(e) Failure and negligence in other respects that will be shown at the trial.

Sixth: As a result of the said injuries, the plaintiff has suffered great pain and mental anguish, lost a great deal of time from his usual work, incurred medical expenses, and has suffered and will suffer other damages as will be

shown at the trial, all in the sum of Fifty Thousand ($50,000.00) Dollars.

Seventh: This cause of action is brought under the Merchant Marine Act of 1920 commonly called the Jones Act.

WHEREFORE, the plaintiff demands judgment against the defendant in the sum of Fifty Thousand ($50,000.00) Dollars, together with costs and interest.

COUNT II.

First: The plaintiff is a resident of Reading, within the District of Massachusetts, a seaman and fisherman, and at the time hereinafter referred to a member of the crew of the fishing vesssel RACER.

Second: The defendant was and still is a corporation duly organized under the laws of the Commonwealth of Massachusetts, having its principal place of business in the City of Boston, within the District of Massachusetts, and at the time hereinafter referred to owned, operated and controlled the fishing vessel RACER.

Third: On or about April 1, 1957, the plaintiff was in the employ of the defendant as a seaman and fisherman on the fishing vessel RACER.

Fourth: On or about 1, 1957, while the said fishing vessel was in navigable waters at the Fish Pier, Boston, Massachusetts, and while the plaintiff was in the exercise of due care in the performance of his duties, he received severe and painful personal injuries of a permanent nature.

Fifth: The injuries sustained by the plaintiff were due to no fault of his own, but due to the fault of the defendant in failing to supply a seaworthy vessel.

Sixth: As a result of the said injuries, the plaintiff has suffered great pain and mental anguish, lost a great deal of time from his usual work, incurred medical expenses, and has suffered and will suffer other damages as will be

shown at the trial, all in the sum of Fifty Thousand ($50,000.00) Dollars.

Seventh: This cause of action is brought under the General Maritime Law for Unseaworthiness and is for the same cause of action as Count I.

WHEREFORE, the plaintiff demands judgment against the defendant in the sum of Fifty-Thousand ($50,000.00) Dollars, together with costs and interest.

COUNT III.

First: The plaintiff is a resident of Reading, within the District of Massachusetts, a seaman and fisherman, and at the time hereinafter referred to a member of the crew of the fishing vessel RACER.

Second: The defendant was and still is a corporation duly organized under the laws of the Commonwealth of Massachusetts, having its principal place of business in the City of Boston, within the District of Massachusetts, and at the time hereinafter referred to owned, operated and controlled the fishing vessel RACER.

Third: On or about April 1, 1957, the plaintiff was in the employ of the defendant as a seaman and fisherman on the fishing vessel RACER.

Fourth: On or about April 1, 1957, while the said fishing vessel was in navigable waters at the Fish Pier, Boston, Massachusetts, and while the plaintiff was in the exercise of due care in the performance of his duties, he received severe and painful personal injuries of a permanent nature.

Fifth: As a result of his injuries, the plaintiff incurred expenses for his maintenance and cure and will continue to do so all to his damage in the sum of Five Thousand ($5,000.00) Dollars.

WHEREFORE, the plaintiff demands judgment against the defendant in the sum of Five Thousand ($5,000.00) Dollars, together with costs and interest.

The plaintiff hereby demands a trial by jury on all the issues raised in Counts I, II and III.

By his attorney,

(s) Morris D. Katz
70 State Street
Boston, Massachusetts

DEFENDANT'S ANSWER

Count I.

First: The defendant admits the allegations of the first paragraph of Count I.

Second: The defendant admits the allegations of the second paragraph of Count I.

Third: The defendant admits the allegations of the third paragraph of Count I.

Fourth: The defendant denies the allegations of the fourth paragraph of Count I.

Fifth: The defendant denies the allegations of the fifth paragraph of Count I.

Sixth: The defendant denies the allegations of the sixth paragraph of Count I.

Seventh: The defendant neither admits nor denies the allegations of the seventh paragraph of Count I.

Further answering, the defendant alleges as a further defense thereto that the aforementioned injury was occasioned without the privity or knowledge of the defendant; the amount of the damages alleged in said complaint greatly exceeds the amount or value of the defendant's interest in said vessel and her freight then pending; and the defendant invokes the benefit of the provisions of the Revised Statutes of the United States and the acts amendatory thereof and supplemental thereto in limitation of the lia-

bility of ship owners, under which provisions, should the defendant be held liable for or by reason of the matters, or any of them, set forth in the complaint, the plaintiff is not entitled to recover damages therefor in a sum in excess of the amount or value of the defendant's said interest in said vessel at the conclusion of the voyage upon which said injury occurred and her freight then pending.

And further answering, the defendant says that if the plaintiff sustained the alleged injuries, such injuries were due to his own negligence.

COUNT II.

First: The defendant admits the allegations of the first paragraph of Count II.

Second: The defendant admits the allegations of the second paragraph of Count II.

Third: The defendant admits the allegations of the third paragraph of Count II.

Fourth: The defendant denies the allegations of the fourth paragraph of Count II.

Fifth: The defendant denies the allegations of the fifth paragraph of Count II.

Further answering, the defendant alleges as a further defense thereto that the aforementioned injury was occasioned without the privity or knowledge of the defendant; the amount of the damages alleged in said complaint greatly exceeds the amount or value of the defendant's interest in said vessel and her freight then pending; and the defendant invokes the benefit of the provisions of the Revised Statutes of the United States and the acts amendatory thereof and supplemental thereto in limitation of the liability of ship owners, under which provisions, should the defendant be held liable for or by reason of the matters, or any of them, set forth in the Complaint, the plaintiff is not entitled to recover damages therefor in a sum in

excess of the amount or value of the defendant's said interest in said vessel at the conclusion of the voyage upon which said injury occurred and her freight then pending.

And further answering, the defendant says that if the plaintiff sustained the alleged injuries, said injuries were due to his own willful misconduct.

The defendant claims trial by jury on all Counts.

By its attorneys,

(s) KNEELAND & SPLANE

KNEELAND AND SPLANE

by (s) JAMES A. WHIPPLE

MOTION TO AMEND DEFENDANT'S ANSWER

Now comes the defendant and moves to amend his answer by striking out paragraphs third and fourth of Count I and paragraphs third and fourth of Count II and substituting therefor the following answers:

COUNT I.

Third: The defendant admits that on or about April 1, 1957 the plaintiff was in the employ of the defendant as a seaman and fisherman but denies that on that day at the time of the occurrence of the plaintiff's alleged accident the plaintiff was acting as a seaman and fisherman in the employ of the defendant on the Fishing Vessel RACER.

Fourth: The defendant denies that the plaintiff was performing any duties for the defendant at the time of his injury and denies the remaining allegations of paragraph fourth.

COUNT II.

Third: The defendant admits that on or about April 1, 1957 the plaintiff was in the employ of the defendant as a seaman and fisherman but denies that on that day at the time of the occurrence of the plaintiff's alleged ac-

cident the plaintiff was acting as a seaman and fisherman in the employ of the defendant on the Fishing Vessel RACER.

Fourth: The defendant denies that the plaintiff was performing any duties for the defendant at the time of his injury and denies the remaining allegations of paragraph fourth.

By its attorney,
(s) JAMES A. WHIPPLE
of Kneeland and Splane

Sept. 19, 1958. WYZANSKI, J.
Hearing.
Motion allowed.
(s) W. J. LYONS
Deputy Clerk

STENOGRAPHIC RECORD OF TRIAL.

[2] FRANK C. MITCHELL, Sworn

Direct Examination by Mr. Katz

* * *

[8] Q. Where were you standing at the time? A. On the rail.

Q. And you caught hold of a rung of the ladder with which hand? A. My right hand.

Q. And what else did you do and what happened? A. I reached with my right hand and caught hold of a rung, with my right foot just about touching the rung of the ladder. My left foot slipped.

Q. Wait now. What was touching the rung of the ladder?
[9] A. My right hand.

The Court: I understood you to say just about touching. Which did you say?

The Witness: My right foot.

The Court: No, no, I'm talking about your hand.

The Witness: My right hand was ahold of the rung of the ladder. I had ahold of a rung of the ladder.

Q. You had ahold of it. What did you do with your right foot? A. I reached with my right foot and just about touched the rung of the ladder.

The Court: The right foot had just about touched?

The Witness: Yes, sir, just about touched.

Q. Go ahead. A. My left foot slipped in the slime on the rail. I wrapped my right arm around the upright of the ladder to keep from falling between the pier and the boat.

Q. And you were suspended in air? A. Yes, sir.

Q. Hanging on by your arm wrapped around the ladder? A. Yes, sir.

* * *

[14] Q. Now, when did you start landing spawn that morning? [15] A. Around 6 o'clock in the morning.

Q. And at what time was all the spawn out? A. 6:30, a little before.

* * *

[25] *Cross-examination by Mr. Whipple*

* * *

[41] XQ. What time did you leave the vessel, sir? A. I left the vessel around quarter past seven that morning, that is, when the accident happened, and I went ashore.

* * *

[42] [Conference at the bench, during which the following is recorded:

The Court: I am quite prepared to rule as a matter of law, that he was an employee engaged in the performance of his duty at the time that he was

standing on the rail. I so rule, and your exception is saved.

Mr. Whipple: Thank you, sir.]

The Court [to Jury]: I have ruled, that at the time the plaintiff was on the rail and about to go on the ladder he was an employee of the ship and was engaged in the performance of his duties, and I rule that upon the undisputed evidence, and I make it a ruling of law, the rights, of the defendant with respect to my ruling being preserved.

* * *

[1] MAX H. HAUFF, Sworn

Direct Examination by Mr. Katz

* * *

[6] Q. Now how long did it take to get the spawn out? A. About 20 minutes, sir.

Q. When did you start taking the spawn out? A. I couldn't tell the minute, but about 6 o'clock.

* * *

[1] *Charge to the Jury*

* * *

The Court:

In this case, on the basis of rulings I made earlier, I have instructed you on the undisputed fact, Mr. Mitchell is to be regarded as being an employee of the defendant and therefore entitled to those rights if any which flow from the maritime law and flows from the act of Congress.

* * *

[5] In a case like this we have the argument presented here, which you do not have to believe, that the ship was unseaworthy because at the time of the injury there was on the rail of the ship some kind of slime. Well, if that really was there and had been there any period of time, and it caused the accident, then you would find

as a matter of your conclusion of fact, that unseaworthiness caused the accident.

I haven't told you what unseaworthiness is. You will recognize it is somewhat overlapping and alternative to, indeed quite similar to, negligence because it is one of the obligations of the owner of a ship to see to it through appropriate captains, mates, members of the crew, or someone, [6] that there isn't left upon the rail of a ship, especially a rail which is going to be utilized for leaving the ship, to climb the ladder, any sort of substance such as slime.

It doesn't make any difference who puts it there. As far as the owner-operator of the vessel goes, it is his job to see it does not stay there too long, if he knows it is the kind of place, as he could have known here, which is used by members of the crew in getting off the ship.

So I think it would be fair to tell you the real nub of this case which I hope has not been cloutled for you, the real nub of this case is, Was there on the rail some slime; was it there for an unreasonably long period of time; was there a failure on the part of the owner-operator through appropriate agents to remove it; and was that slime the cause of the injury which the plaintiff suffered.

* * *

[12] Was there something there and was it there for a reasonably long period of time so that a shipowner ought to have seen that it was removed? That is the question.

* * *

[17] Mr. Katz: May I make a further request? In your charge you specifically said "and was it there for a reasonably long period of time so that the shipowner could have had it removed."

I submit that would apply to the negligence count only but with respect to unseaworthiness, if there is an unseaworthy condition, there is an absolute situation, there is no time required. It is the only—

The Court: Denied. Refer to the case in the Second Circuit.

* * *

[18] Mr. Katz: May I save my rights on that?

The Court: Saved, automatically.

* * *

JUDGMENT

WYZANSKI, J. After trial and in accordance with the verdict of the jury, it is

ORDERED judgment for the defendant on Counts I and II of the complaint and judgment for the plaintiff on Count III of the complaint in the amount of $2500, minus $282.00 heretofore paid.

By the Court,

(s) C. WYZANSKI
U. S. D. J.

(s) MIRIAM M. WYNN
Deputy Clerk.

Judgment entered October 2, 1958.

NOTICE OF APPEAL

Notice is hereby given that pursuant to Rule 73(b) of the Rules of Civil Procedure, Frank C. Mitchell, the plaintiff in the above-entitled action, hereby appeals to the United States Court of Appeals for the First Circuit from that portion of the Judgment entered on October 2, 1958, relating to Count II of the Plaintiff's Amended Complaint, the said Count II being based upon the unseaworthiness of the defendant's vessel.

(s) MORRIS D. KATZ
Attorney for the Appellant

No. 5429.

United States Court of Appeals
For the First Circuit

FRANK C. MITCHELL,

PLAINTIFF, APPELLANT,

v.

TRAWLER RACER, INC.,

DEFENDANT, APPELLEE.

RECORD APPENDIX FOR

THE APPELLEE

JAMES A. WHIPPLE,
Attorney for Appellee.

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RECORD APPENDIX

STENOGRAPHIC RECORD OF TRIAL

* * *

[2] FRANK C. MITCHELL, Sworn

* * *

[25] *Cross-examination by Mr. Whipple*

XQ. Well, now, Mr. Mitchell, has all of your fishing been out of Boston? A. In the last twenty years.

[26] XQ. For the last twenty years? A. Yes, sir.

XQ. Do you mind if I stand a little closer? Can you hear me a little better? A. I would like to have you stand a little closer, if you don't mind.

XQ. Well, now, customs have changed down at the Fish Pier during the last twenty years, haven't they? A. Some, I suppose; yes, sir.

XQ. Twenty years ago all the fishermen unloaded their own catch, didn't they? A. To a certain extent. Not all.

XQ. Well, do they now much more use lumpers? A. Some hire lumpers. More doesn't.

XQ. Lumpers are men who go down and unload the catch which fishermen have brought in, isn't that right? A. Yes.

XQ. They are not members of the crew? A. No, sir.

XQ. And on this day about what time did the RACER get to the dock, sir? A. What time did he get to the dock?

XQ. Yes. A. She docked at midnight, if I remember right, on a Sunday night.

[27] XQ. Did you go home that night? A. No, sir.

XQ. You stayed aboard? A. No way to go home.

XQ. You could have gone home? A. No way to get home. Too late for trains.

XQ. Sir? A. Too late for trains.

XQ. Oh, I see. Had there been transportation avail-

able you were free to go home if you wanted to? A. I could have gone home if I wanted to.

XQ. Sure. So could all the other members of the crew, couldn't they? A. That was entirely up to them if they wanted to go or not.

XQ. They could have, or they could have stayed? A. No penalty.

XQ. No. And then of course you are paid by a share of the catch which you bring in; isn't that true? A. Oh, yes, we share in the catch.

XQ. If you went out on the RACER and brought in 150,000 pounds of fish, or something like that, you would get certain percentage of the money that that was sold for? A. That's right.

XQ. And the boat owner gets a percentage of that; isn't that true? A. They do on the ground fish, yes. [28] XQ. Yes. And at this time you were ground fishing, sir? A. We were ground fishing.

XQ. Halibut, cod, swordfishing? A. We don't get no halibut any more.

XQ. No, but edible fish, aren't they? A. If we got halibut we would gladly take care of it—

XQ. Sure. Well, now, that's the catch of the vessel, isn't it? A. Everything is the catch of the vessel.

XQ. That is the catch out of which the boat owner gets his share and out of which you get a share? A. That's right.

XQ. Now, when the fish are spawning you get the fish spawn, don't you? A. Fish eggs, yes.

XQ. That is the eggs of the fish; correct? A. Yes.

• • •

A. Always did have the spawn, the crew members.

XQ. Yes. But the boat owner doesn't get any share of that, does he? A. As a rule they don't take any. They are entitled to have it.

XQ. Always they don't do they? A. I never been on any boat when the owner got spawn.

[29] XQ. No. They never have to your knowledge? A. No, sir.

XQ. No. And that money from the fish spawn is split up amongst the members of the crew? A. That's right.

XQ. And no share is given to the captain, is there? A. No, he don't take no share. He gets a commission from the boat owner.

XQ. He doesn't get any part of the money that is received from the sale of this fish spawn? A. That's entirely up to him.

XQ. Well, he doesn't get it, does he? A. I wouldn't say. The average skipper isn't mean enough to take anything from the crew. He's entitled to it. He's a crew member. All crew members are entitled to the spawn, if they want it but they don't. They let it go to the crew members, and them as takes the spawn—

XQ. And the mate doesn't get a share of the fish spawn, does he? A. No.

XQ. And the cook doesn't, does he? A. He gets his per.

XQ. My question, sir, is about the fish spawn. The cook gets no share of the money that is received from the sale of this fish spawn, does he? [30] A. No.

XQ. No part of the receipts for the sale of the fish spawn? A. No.

[Discussion off the record.]

XQ. Does the engineer receive any share of the money received from the sale of spawn? A. No.

XQ. No. None of the officers of the boat get any share of it, do they? A. No.

XQ. And if the captain tried to take a share, as you said he could, the crew would quit, wouldn't they? A. I

don't think they would quit. They would have a hearing on it, the crew and the officers of the boat.

XQ. They would have a hearing on it? A. They would among themselves.

XQ. The crew would? A. Everybody would get together in a huddle and straighten the whole thing out.

XQ. Who do you mean by everybody? A. Crew members—engineers, mates, cook, everybody would get together.

XQ. The boat owner wouldn't be there? A. No, but this may be on the outside.

XQ. What? [31] A. Maybe this thing would occur outside on the fishing grounds.

XQ. When something occurs out there, they have a meeting of the crew to decide what is to be done about it? A. If the captain feels anything unexpected comes up, he generally calls the crew members together, they go in the galley, he calls them all together in the galley and talks the thing over.

XQ. Well, now, as you catch the fish spawn at sea, you put it in bags, don't you? A. We pick it in boxes and lump it in bags.

XQ. You pick it in boxes and then dump it into bags? A. That's right.

XQ. And you store it in the hold of the vessel in ice? A. That's right.

XQ. Separate from the fish? A. At the present time, yes.

XQ. And at the time you were hurt? A. Yes.

XQ. At the time you were hurt? A. Repeat that again, please.

XQ. You store fish spawn in the hold separate from the ice? A. From the ice?

XQ. Separate from the fish. A. We did, yes; underneath the hatches.

[32] XQ. And then you store the fish in other bins down below the deck, don't you? Correct? A. Some underneath the deck. The first of the catch goes underneath the deck.

XQ. Yes. A. Then you work up. You fill the bottom decks first.

XQ. Now when the vessel comes in the first thing to be unloaded is the spawn, isn't it? A. Yes, sir.

XQ. And the crew unload that? A. Yes, sir.

XQ. And by custom and practice the captain has nothing to do with it? A. He don't get no share, no, as a rule.

XQ. He has nothing to do with it, has he? A. No, sir.

XQ. You decide, you and the other crew members, deck hands, decide amongst yourselves how you are going to unload the spawn? A. That's the agreement we have in our sailing rules and regulations.

XQ. Yes. And you and the other eleven men decide amongst yourselves how the spawn will be unloaded? A. We unload it in the regular manner. There's only one way to unload it, just one way.

XQ. You decide amongst yourselves who will be the winch operator, [33] don't you? A. Well, you might say, "You go on the winch, I'll go on the deck," or "I'll go down the hold."

XQ. Surely. You yourself say, "I'll go in the hold," or "I'll go on the dock"? A. Any place.

XQ. Yes. But the captain didn't order any of you to do that particular job, did he? A. No.

XQ. No. And the mate didn't? A. The mate don't give us no orders to take it out, no.

XQ. Of course not. By custom and practice the boat owner lets you do it; isn't that right? A. That's right.

XQ. Sure. So you and the other eleven men, members of the crew, on that crew at that time, were unloading

some fish which you had caught for yourselves and for which you alone were to get the pay; isn't that right? A. That's all in our trip, spawn in all in our catch—spawn.

XQ. It is? A. Yes, sure it is, for the crew members; it all goes to the crew members.

XQ. What's that? A. I'm speaking of the crew members. This is in our trip; it's in our trip—spawn, and spawn bait.

[34] XQ. Yes, that's what you're saying. A. That's right.

XQ. This money received from the sale of the spawn goes through the owner's books, sir? A. No, sir.

The Court: I think I am clear now about the spawn, unless it is contested. Is it contested, Mr. Katz?

Mr. Katz: What is that, your Honor?

The Court: Well, it is perfectly clear the spawn is sold for the account of the crew, not including the captain, the mate and the cook, and that the mate and the captain have nothing whatsoever to do with the unloading of the spawn.

Mr. Katz: No, I don't.

The Court: You don't agree to that?

Mr. Katz: Why, no.

The Court: Well, that is the testimony of your own witness up to now.

Mr. Katz: If your Honor please,—

The Court: You have a right to cross-examine. We'll see what happens.

XQ. The money from the spawn is taken by one of you, either by you or one of the other eleven crew members, isn't it, sir? A. The money goes to the Exchange first.

XQ. To the Exchange? A. To the corporation.

[35] Mr. Katz: May I now object to the continued line of questioning because, as was brought out, Mr.

Whipple has not gone into this, this accident occurred three-quarters of an hour after the spawn was all out.

The Court: Well, as I understood it, part of the claim asserted by you in the opening was, that the plaintiff slipped on the ladder where the spawn was—

Mr. Katz: The rail.

The Court: The rail—where spawn was located, on the rail.

Mr. Katz: That is correct.

The Court: All right. Then it is certainly pertinent to find out whether the spawn is something which was within the control of the crew or was in the control of the captain and the mate. Your statement indicated you were blaming to some extent the failure of the mate to act.

Mr. Katz: That is correct.

The Court: Well, I should think this is plainly relevant.

Mr. Whipple: May I have my last question, sir?

[Last question and answer read.]

XQ. And what is the Exchange? A. Where the fish is sold in the morning.

XQ. That doesn't have anything to do with the boat owner, does it?

[36] The Court: I beg your pardon? I didn't hear that.

XQ. That has nothing to do with the boat owner, does it—the Exchange? A. That's where he gets his money for his boat.

XQ. You mean, that's where he sells his catch? A. And that's where the money is collected.

XQ. I see. And the money that is collected for the spawn in the Exchange is collected by whom, sir? A. One of the crew members.

XQ. One of you, you or one of the other eleven? A. That's correct.

XQ. The deck hands? A. That's right.

XQ. Sure. And when he gets that money what does he do with it? A. Will you repeat that again?

XQ. When he gets the money from the Exchange, whether collected amongst the crew members, what does he do with the money? A. They divide it up amongst the twelve crew members.

XQ. Surely. A. After the Exchange gets her part for the scalage and wharfage.

XQ. Now, the captain as soon as the vessel comes in goes off duty, I suppose, doesn't he? A. He's all through for that trip and goes home.

XQ. Sure. He goes home to his family or elsewhere? [37] A. That's right.

XQ. Or does whatever he wants? A. That's right.

XQ. Now I suppose the mate goes home sometimes, too? A. They occasionally go home, yes. They have homes the same as anybody else.

XQ. After the catch is unloaded? A. Everything is all out for that day.

XQ. And that's the catch of fish you're talking about, isn't it? A. Everything, the spawn and everything is out.

XQ. Well, the spawn always comes out before the fish, doesn't it? A. Well, yes, as a rule it does.

XQ. Well, not as a rule but always, doesn't it? A. It's underneath the hatches and it's got to come out first.

XQ. Sure. You pack it in there so you can get it out first, don't you? A. That's right.

• • •

XQ. Yes, you always get it out of the way before the boat is unloaded? [38] A. That's right.

XQ. And the mate, his job is only to check the tallies to make sure that the crew and the vessel owner are not cheated when the fish are weighed; isn't that right? A. The mate supervises the whole trip for the day. He's

there from early morning till late evening, if his duty is done right.

XQ. When does he go home, sir? A. When his work is done for the day he gets his money, whatever time that is—6 o'clock, 7 o'clock 5 o'clock. Depends on the large catch. May be 8 o'clock before he gets home if he lives in Gloucester or lives in Reading.

XQ. That is what, you say, the custom and practice is, sir? A. I always done it all my life, took care of that stuff.

Mr. Whipple: Well, may I ask that answer be stricken, your Honor?

The Court: Oh, I think that is responsive.

XQ. Well, now, on the day that you were hurt you hired a lumper to take out your share of the fish, didn't you? A. When I made up my mind to go home when I was hurt I hired a lumper, not before.

XQ. Didn't you have it all arranged in advance that a lumper would be hired to take your place? A. I told the boss lumper that any time that I wasn't around or to be seen, to hire somebody.

XQ. And the boss lumper is the man who had charge of the vessel [39] while it is in port, isn't he? A. He's the boss lumper, and the shore captain passes it over to him.

XQ. Yes. And he's the fellow that has charge of the vessel in port? A. The crew members hire him.

XQ. In unloading and so on? A. Repeat that again?

XQ. He is the fellow who has charge of the unloading of the vessel—the port lumper? A. To a certain extent. The mate is in charge of that boat. The boss lumper is just an average workingman that hires the men for the outside work.

XQ. The boss lumper is the man who directs the other lumpers how to unload the catch? A. The boss lumper

don't tell me where to work, how to work or anything. I'm my own boss. All the crew members as well. The boss lumper hires four to six extra men to make a crew to discharge that trip. He's in charge of those six. But the other crew members pick their own jobs. He's got nothing to do with it at all.

XQ. You pick your own jobs? A. That's right. Pick your own job. He's got nothing to do with me or anybody else.

XQ. Well, now, on this morning that you were hurt you had got [40] the spawn out of the way, and did you tell us that you intended to unload the catch that day? A. I didn't tell you anything like that.

XQ. Didn't you just say that; that the reason you hired a lumper was because you were hurt? A. No, I didn't say that.

XQ. Didn't you just say that? A. No.

XQ. Well, did you intend to hire a lumper that morning? A. I was intending to hire a lumper, yes.

XQ. You weren't going to unload the fish then, were you? A. No. It was my privilege to go home when I feel like it.

* * *

[41] XQ. Now, you had changed into your shore clothes to go home? A. Yes.

XQ. Just after having finished in the hold unloading the spawn? A. Yes.

XQ. And you were intending to go home to Reading? A. I was going to go to Reading. If I could have got a job checking I wouldn't want to pay $22 or $23, I'd check and change my clothes again. That train don't start till 8 o'clock. I can always change.

XQ. What time did you leave the vessel, sir? A. I left the vessel around quarter past seven that morning, that is, when the accident happened, and I went ashore.

[42] XQ. And you thought you might get a job checking at 8 o'clock? A. Well, I was around there, and very often in the mornings, around seven thirty the lumper came up around, the boss lumper he starts, and I'm through for the day.

XQ. You mean, do I understand you correctly, sir, that you wanted to get a job as a checker but you were still hiring a lumper to take your place in the crew to unload the fish? A. You repeat that again.

The Court: I fail to follow the legal relevance of all this. Will you both step to the bench, together with Mr. Martin and I will make a ruling.

[Conference at the bench, during which the following is recorded:

The Court: I am quite prepared to rule as a matter of law, that he was an employee engaged in the performance of his duty at the time that he was standing on the rail. I so rule, and your exception is saved.

Mr. Whipple: Thank you, sir.]

The Court [to Jury]: I have ruled, that at the time the plaintiff was on the rail and about to go on the ladder he was an employee of the ship and was engaged in the performance of his duties, and I rule that upon the undisputed evidence, and I make it a ruling of law, the rights of the defendant with respect to my ruling being preserved.

[43] XQ. Now, Mr. Mitchell, as you approached the rail on that morning to go ashore, did you look at the rail there? A. No. sir.

XQ. Didn't look at it? A. No.

XQ. Well, you took one step on the checker? A. That's right.

XQ. And you stepped from there to the net? A. Yes, sir.

XQ. Which was lying in the scuppers? A. No scuppers. Tied snug to the rail. Snug into the rail, where it's always tied. No scuppers, no nothing. That's only on Georges, around Brown's, it's laying around the scuppers, like something you see in a yard.

XQ. You stepped on the net, in any event, which you say was fastened to the rail? A. It was tied tight, up tight to the rail. That's correct.

XQ. Tied tight to the rail. And you stepped on the net with both feet, sir? A. Yes.

XQ. Did you look where you stepped when you stepped on the net, sir? A. No, I just stepped on the net.

XQ. You didn't look where you stepped? A. You always step on the net because you never step any other [44] place.

XQ. I didn't quite hear your last answer, sir.

The Court: He said it isn't any different from any other place.

The Witness: Any other part.

XQ. You never look where you are stepping; is that what you mean? A. I look where I'm stepping more or less but I didn't this time because I wanted to go home.

XQ. You mean, what were you— You wanted to go home? A. I wanted to get ashore. I wanted to get ashore. My work was done for that morning as far as I knew at that time.

XQ. Well, which was it: Did you want to get ashore to go to work, or did you want to get ashore to go home? A. I wanted to go home after I was hurt. I had to go home, I couldn't work.

XQ. Well, you hadn't been hurt yet this first time, had you? A. That was my first time ashore.

XQ. Yes. You hadn't been hurt, had you? A. Will you repeat that again? You're trying to run something down —trying to tell me my work is not all right. You repeat

this in plain English or else I'll answer no questions, for you or nobody else. I tell lies to nobody. I'm not a liar.

The Court: Now, Mr. Mitchell, just a moment, please. It's a very difficult thing to be a witness, and unquestionably it is hard to have to answer questions put by a lawyer who is [45] more used to being in court than you are; but I want to assure you that, in general, it is not the habit of lawyers in this court to try to trick witnesses, and Mr. Whipple isn't trying to trick you, he is trying to find out what the facts are.

The Witness: He's trying to tear me up, your Honor.

The Court: Well, very probably!

The Witness: Which he's going to have a job to do.

Mr. Katz: Now, Mr. Mitchell, please! You just answer the questions, please.

XQ. My apologies if I upset you, Mr. Mitchell.

The Court: Well, now, go ahead.

XQ. But I am only, as his Honor said, trying to find out what happened. A. You're trying to ball me up.

The Court: Gentlemen, gentlemen, let us start again!

XQ. And in order that you may not be confused—when you stepped on the checkerboard, sir, did you look where you stepped then? A. No, I just stepped on the checker like we always do.

XQ. Well, don't you usually look at it when you step on it, sir? A. Well, sometimes Yes, sometimes No. We're accustomed to stepping on that checker, we're used to that.

XQ. So then you stepped from there to the net—and this is the first time you went ashore, sir? A. The first time.

XQ. Before you got hurt? A. Yes.

[46] XQ. And you were intending to go home, you tell us? A. I was going home after—I was on the way home.

XQ. You were on the way home, yes. A. I was on the way ashore. I was on my way ashore at that time.

XQ. All right. On this first time did you look at the net where you stepped on it, sir? A. No, I just stepped right on it, that's all.

XQ. Were the rollers rolled up with the net, sir, or were they separate? A. The rollers is tied up first, hugged up tight to the rail.

XQ. And the net on top? A. And the net on top, set firmly, tied to the boat after coming about 240 miles from Boston.

XQ. And can you tell us whether where you stepped there was a roller or there was not a roller? A. Where I stepped?

XQ. Yes. A. Well, I couldn't say. Yes, there was a roller. There was a small one or a big one.

XQ. It was a small one or a big one? A. That's correct.

XQ. Then you say you stepped on the rail with both feet, sir? A. Yes, sir.

XQ. And you did not look at the rail? [47] A. No, sir.

XQ. And then you reached across to the ladder with your right hand? A. Yes, sir.

XQ. Did you look at the ladder, sir? A. No, sir. I raised my hand and caught ahold of it, caught ahold of the ladder.

XQ. Did you look at the ladder as you reached or before you reached? A. I could see the ladder was there on the pier. I had to see the ladder.

XQ. Did you look at it, sir? A. I saw there was a ladder and I reached with my right hand.

XQ. Yes. And then just at that moment, sir, the vessel moved; is that right? A. The vessel moves at all times. They never stop. They're always moving, more or less, all the time.

XQ. And at that moment the vessel moved away from

the pier, didn't it? A. It moved a couple of inches or so from the pier.

XQ. And was that what caused your left foot to come off the rail, sir? A. No, sir. I slipped in the slime on the rail.

XQ. Now, when did you first see the slime on the rail, sir? A. When my foot slipped I noticed the slime.

[48] XQ. Were you at that time hanging on the ladder? A. After I slipped I was hanging on the rung, the upper edge of the ladder, across my arm here, banging through here [pointing].

XQ. Yes, sir. Was that the time when you first noticed the slime? A. No, sir. When I slipped I noticed the slime was there.

XQ. You mean, when you slipped you look down at your left foot and saw that there was slime? A. It had to be slime to slip on it. You don't slip on a rail, on a clean rail; you don't slip on a clean rail. That rail was rusty, the scales of rust come off, the paint in some places, rust in some more. Rust, if the rail is right.

XQ. Are you telling us, Mr. Mitchell, that there was slime on the rail because your foot slipped? A. Sure there was slime on the rail. Ten or fifteen feet of that rail was loaded with nothing but slime and gurry.

XQ. And did you come to the conclusion that there was slime on the rail because your foot slipped?

The Court: I don't think he understands that question. That has in it something which he cannot be expected to understand.

Mr. Whipple: I'm not attempting to be unfair, your Honor.

The Court: No, but you better put another question.

[49] XQ. When did you first see the slime? A. When my foot slipped.

XQ. Did you look right at it then, sir? A. I could see the slime.

The Court: No, the question is, did you actually see the slime?

The Witness: Yes, sir, when my foot slipped.

The Court: You saw it?

The Witness: I saw the slime, sir, I see the slime, because I was reaching for the ladder when my foot slipped. I could see the rail down here with slime on to it, down at my left side here. That is, when I hung up I couldn't see it because I was this way [illustrating]. Here's the rail here.

XQ. You hung up there, you said, for a— A. A minute or two.

XQ. My question was—I didn't hear your answer, sir.

The Court: Only for a minute or two, he said.

XQ. Yes; and then you said you got back aboard the vessel? A. Yes, sir.

XQ. And when you got back where did you put your feet, sir, as you were getting back aboard the vessel? A. On the net.

XQ. Wasn't the net flush with the rail, sir? A. I should judge it was about an inch or so, maybe an inch or two, maybe five. I couldn't just say to be honest now because a net is tied up snug to the rail, and with people walking back [50] and forth with the weight it sags down, people stepping on to it. Sometimes it's as high as 6 to 10 inches, sometimes 4. Depends on how tight, how snug the net is.

XQ. At this time could you tell us what your best memory is as to how far below the rail the net was when you stepped on it? Was it an inch or two, about? A. 2 or 3 inches, I should say. Maybe 4. I don't remember. I didn't measure it.

The Court: May I suggest you take it a little easier and relax. You will give better answers.

The Witness: Thank you, your Honor.

XQ. Well, then, you say you stayed aboard the vessel for a while? A. Repeat that again.

XQ. After you got back aboard the vessel—you stepped on to the net, then you got back aboard the vessel? A. I stepped on the checker, I put my hand on the fairlead getting back on the main deck.

XQ. Did you look this time at the rail as you came back? A. I could see it right there. Looking at it then. All the rail for 10 or 12 feet it was all wet and loaded with gurry. Couldn't help but seeing it.

XQ. You couldn't help but seeing it? A. Yes, because there was this slime and stuff for 10 or 12 feet where the rail was wet.

XQ. There was so much of it you couldn't help seeing it? Is [51] that it? A. Well, it was all along the rail.

XQ. What's that? A. It was all along the rail. If you're going ashore you don't hang around, you go down to your position where your ladder is to, and you step on the net if it's down low enough, and if it's too high you generally step on the checker that's there and go on the rail and go ashore. Sometimes you go to work and the net is right up tight very often and you put your feet on the net.

Mr. Katz: Couldn't we stop this and ask the next question?

The Court: He's your client!

Mr. Katz: I know it, but I'm suffering just as much as others are. Please just answer the question, Mr. Mitchell, because otherwise we'll be here all night.

Mr. Whipple: There's no call for this interruption and interference, your Honor.

The Court: Well, as a matter of fact, gentlemen, you

are both used to trying cases here, and the witness isn't used to it here. Would you please briefly answer the questions? Your own counsel is afraid, and quite justly so, that when you give a long answer you don't advance your cause at all, you just open up a lot of new territory for further examination adverse to you, so answer as briefly and quietly as possible.

[52] The Witness: Thank you very much, your Honor.

XQ. Now, you got back down on to the deck of the RACER and you stayed there for a while looking around? A. Yes, sir.

XQ. About how long, sir? About five or ten minutes? A. Two or three minutes.

XQ. Now, was your witness there at that time? A. Mr. Hauff was there on deck, yes, sir.

XQ. Was he there when you started up the ladder the first time, sir? A. He was there around the hatch.

XQ. Now the next time that you went up, or the second time that you went ashore, or tried to go ashore, how did your sea bag get ashore?

Mr. Katz: Well, now, if you please, there was no sea bag. He called it a handbag.

Mr. Whipple: Well, handbag. Excuse me.

Mr. Katz: There's a great difference.

Mr. Whipple: Handbag.

The Court: How did your handbag get ashore?

A. The Witness: That was handed up to me, your Honor. Mr. Fitzpatrick passed it up to me.

XQ. You climbed up yourself, sir? A. Yes, sir, I got up myself somehow.

XQ. And you say this time you looked at the rail and you stepped [53] from the net on to the rung of the rail? A. Will you repeat that again? Over here, please, so I can hear what you're talking about.

XQ. I'll be only too happy. The second time that you went ashore you went up by yourself? A. Yes, sir.

* * *

[1] XQ. You don't mind if I stand close to you, Mr. Mitchell, so that you may hear me, sir? A. No, I like for you to stand close.

XQ. At the time you were hurt, which was approximately at what time in the morning, sir, again? A. 7:15, approximately 7:15.

XQ. At that time had most of your fellow workers gone ashore? A. That I could not say. That is a thing I could not say. I only saw two around deck, around the boat, I should say. What was on the pier to my knowledge was scattered all around, one place and another.

XQ. There were only two or three men at most left on the boat, isn't that so, Mr. Mitchell? A. Something like that.

XQ. Yes. Did they go ashore? Was there any other means of going ashore except by the ladder that you used? A. There was a ladder up in the stern. Whether they could leave by that ladder I could not say.

XQ. There was another ladder on the stern? [2] A. Yes, sir.

XQ. How near the quarter was it? A. Way back on the stern.

XQ. You do not know whether that could have been used? A. I would not know.

XQ. Sir? A. I would not know.

XQ. Well, the vessel was lying which side to, sir? A. The port side of the boat, on the north side of the Boston Fish Pier.

XQ. As far as you know that after ladder was perfectly usable, wasn't it? A. I would not know, I didn't see the ladder.

XQ. You knew it was there? A. I knew it was there,

ladders were on both sides of the pier and the face of the pier, all the whole ways is ladders.

XQ. How long was the RACER, sir? A. 114 feet, somewhere about.

XQ. On a vessel that length, are there at least two ladders available to go ashore, is that right, on the pier? A. Yes, sir.

XQ. I show you a picture, Mr. Mitchell, showing the north end of the pier, at the end nearest the inner part of the harbor and that was where she was moored, was it? A. She was on the northern side of the pier.

[3] XQ. On that part of it nearest the— A. Edge.

XQ. The inner harbor? A. The end of the pier.

XQ. The end of the pier will take four or five vessels, won't it? A. It used to. They used to always figure three boats across the head of the pier.

XQ. Across? A. Yes. This is the side.

XQ. What I want to know, Mr. Mitchell, is what part of that north end of the pier the RACER was on? A. She was on the corner.

XQ. On the corner nearest the inner part of the harbor, wasn't it? A. On the corner headed up towards Northern Avenue.

XQ. Yes. Up, let us say, in the direction of the Navy Yard? A. That is the south side, the Navy Yard.

XQ. The Charlestown Navy Yard, I am talking about. A. Right, Charlestown.

XQ. You were on the corner nearest the Charlestown— A. Yes.

XQ. I show you a picture of the trawler MICHIGAN moored in that same position. I ask you if the MICHIGAN is moored about the same as the RACER was at that time? A. This is the trawler MICHIGAN here?

XQ. That is the MICHIGAN, yes sir. [4] A. The MICHIGAN is across the head of the pier.

XQ. I didn't hear you. A. The MICHIGAN is across the head of the pier, here is the head of the pier here.

XQ. Isn't that where the RACER was up around here, right here, you see this, in my opinion, here.

XQ. The RACER wasn't on the head of the pier but was off on the side of the pier? A. On the corner, on the north side.

XQ. She was moored, her port side on that side of the pier which is called the side and not the end? A. The side is not the end, the side is the side, the end is the end.

XQ. So when you say the north corner, you mean on the side of the pier? A. On the side.

The Court: Is this very important?

Mr. Whipple: Well, he testified there were two ladders, he testified so far; I am getting at this, if I may develop this line.

XQ. When she was moored that morning, the RACER I am talking about, there was a stern line, was there not? A. Yes, sir.

XQ. And that went directly across to the pier? [5] A. To the handiest capstan, locked to the boat, the stern line, yes, sir.

XQ. And there was a bow line? A. Yes, sir.

XQ. And the stern and the bow lines kept the vessel close to the pier? A. Supposed to.

XQ. They did that morning, didn't they? A. Why, yes.

XQ. And the stern is just as close as the bow to the pier and was that morning, isn't that right? A. Not at all times. Sometimes the bow is tight. More times the stern line is tight.

XQ. On that morning, sir, on that morning? A. The bow was in further than the stern, I should say. The bow was closer to the pier than the stern was.

XQ. And the ladder that you used was about amidship, wasn't it? A. Yes, sir.

XQ. And it was only a foot or so away from where you stepped across to the stairs, so you told us? A. Just about a foot, I should say, from the rail to the rung of the ladder.

XQ. And there is also a spring line? A. Yes, sir.

XQ. Rigged, or there was a spring line on that morning? [6] A. Yes, sir.

XQ. And the purpose of that line is to check the forward and after surge of the vessel at the pier, isn't it? A. A spring line, hawser, brings it in tight to the pier. the spring—

XQ. So that the whole side of the vessel is right along and held close to the channel, isn't that right? A. If she is breast in, bar-tight, spring, bow and stern line, she got to be tight.

XQ. Of course you have to leave some slack to allow for waves, don't you? A. Water—a little slack.

XQ. If you did not have some slack, and a large wave came in from another vessel, the lines would be liable to snap, wouldn't they? A. The waves don't be that large, to snap the lines.

XQ. If they were held taut and the wave did strike the vessel, it might snap that line, mightn't it, or it might pull the bow loose? A. In a storm, if they were bar-tight, they might break, the lines might break.

XQ. But you allow a little slack for the movement of the vessel, isn't that so? A. Most generally, an inch or two slack, according as to water rises and falls, they generally ease them, have a couple of less [7] turns on it so that it surges itself.

XQ. You do not know whether the rest of your fellow workers who were unloading the spawn, left the vessel

that morning by the ladder which you used or the after ladder, do you? A. I would not know.

XQ. This is the way that vessels have been moored at the Fish Pier ever since you have been fishing, isn't it? A. They always put three lines out when they come in, yes, sir.

XQ. And the members of the crews of the boats have for years used the same method you used of going ashore? A. Yes, they all go back and forth up the ladder, there is no other way to get out, except if the water is high. If the water is high, it is different.

XQ. That is a perfectly proper method of mooring a vessel and supplying means to you of going ashore? A. Yes, sir, that is the way they always moor a boat.

The Court: There is no claim that the mooring was improper.

Mr. Katz: Not by us.

The Court: I am trying to ask Mr. Katz—

Mr. Katz: Not unless Mr. Whipple develops it.

The Court: Don't really answer that way.

Mr. Katz: I am sorry, your Honor, I don't mean to be facetious.

The Court: I am narrowing the issue, never mind [8] what was in the pleadings.

As I understand it, the claim really boils down to a very small question, as to whether or not there was something improper on the rail and whether there was any duty upon the part of either the mate or someone else to observe it and remove it.

Mr. Katz: That is about it.

The Court: Is there anything else?

Mr. Katz: No.

The Court: All right. Never mind what was said before.

Mr. Whipple: I understand that, your Honor. May I

see you for a moment? I don't want the jury to hear what I have to say.

The Court: All right.

[Conference at the bench as follows:

The Court: You have no right to go into some abandonment of claim. Never mind the reasons for return to the abandonment.

I have already asked, in the presence of the jury, what the nature of the claim was. The jury heard. I am not going over it. I may not state it precisely the same as I did before. I think the jury heard it.

The basis of the claim is, is it not, that [9] there is, that there was on the rail an improper substance, it should have been observed and moved by an officer or agent of the vessel. Isn't that the claim?

Mr. Katz: And failure to provide a reasonably safe method of going ashore.

The Court: Are you making some claim that the ship wasn't properly moored?

Mr. Katz: No, sir.

The Court: What do you mean by a reasonably safe method? It is merely another way of saying the same thing.

Mr. Katz: Yes.

The Court: No other claim is involved than the claim there was something on the rail which should not have been there, which should have been observed, and should have been removed, if there was no proper means of exit. In view of this, even if there were other proper means, this was a legitimate means of exit and therefore should have been properly, in his view, scoured and cleaned, or at any rate in such a condition that there was no further substance on it.

Mr. Katz: That is right.

The Court: I think the jury understands it.]

[10] XQ. Do you know, Mr. Mitchell, which of the other deck hands was assigned to work on the Fish Pier when you unloaded the spawn? A. Assigned?

XQ. Well, who agreed to or who among yourselves agreed to be on the dock or on the pier? A. Certain guys go on the pier or go on the hatch. I will go wash paint pots, I will go down the hold.

XQ. Do you sometimes go on the pier? A. Some goes on the pier, yes, sir, I have been on the pier.

XQ. Now on this morning on which you were hurt, you agreed that some person was to go on the pier, is that right? A. I did not agree to nothing. We all spoke up. I work on the pier or—

XQ. You did not object to the man who said he was going on the pier? A. No, sir, I don't object to nobody, wherever he wants to go, the man is privileged to go where he likes.

XQ. No one objected when you said you would go in the hold? A. No, sir.

XQ. You do not know now who the man was that went on the pier? A. Mr. Hauff was one of the guys on the pier.

XQ. Do you now know who the man was who ran the winch head? A. No, sir, I don't.

XQ. Do you know who was working on deck? A. At present I don't because I was down the hold, I would [11] not know.

XQ. Your job was to take the bags of spawn and, what did you do with them, put them on a board? A. No, sir, no board.

XQ. Did you hook them to the tackle hook, something like that? A. We put the tackle hook into the strap on the bag.

XQ. You put the tackle hook in there? A. In the bite.

XQ. And the winch operator ran his winch head with the turns of the rope on it and hoisted it up out of the hatch, is that right? A. The winchman goes ahead when he gets a signal from hatch man.

XQ. One of you men was acting as a hatch man? A. Yes, sir.

XQ. And then it is hauled up and that hatch man pushes it over to the pier, doesn't he? A. It comes up, he just pushes it on the swing, it is quite a height.

XQ. The other man on the pier catches that? A. There is a line, a line made fast to the hook at the end of the tackle.

XQ. What does he do, take hold of the line? A. One part is on the wharf.

XQ. He pulls it over? [12] A. Two or three guys pull it, in case it does not go far enough they pull in the slack.

XQ. Then they weigh it after it gets to the pier? A. They weigh it.

XQ. Surely. Where does the water come from with which the Fish Pier is washed down? A. It comes out of the fish holds on the boat.

XQ. Sir? A. It comes out of the fish holds from the boat.

XQ. The water that is used to wash down the pier comes from where? A. The boat, the fish holds of the boat.

XQ. How is it brought up on the pier, sir? A. It is passed up, the hose is passed up to somebody.

XQ. There is a hose? A. What else?

XQ. Then the water is pumped through the hose by the machinery of the boat, is that what happens? A. Yes, sir.

XQ. Is it salt water from the ocean? A. Yes, sir.

XQ. So that some man up on the pier used a hose from the boat to wash off the pier? A. That is right.

XQ. You do not know whether he did or did not, but that is the [13] usual custom, isn't it? A. Surely he washed it off.

The Court: Did he, on this occasion?

The Witness: Yes, sir, washed the pier down.

The Court: You saw him do it?

The Witness: I didn't see him do it, Mr. Hauff washed it down.

The Court: How do you know he did?

The Witness: I passed the hose to it.

The Court: I think that is very good evidence.

XQ. So that you were at that time all through in the hold? A. When the hold was washed out, the penboards put back in place, we came up.

XQ. And then you passed the hose to Mr. Hauff to wash off the wharf? A. The wharf.

XQ. Did you see that water wash off the wharf at all? A. Mr. Hauff asked for the hose, "Pass the hose." I was using the hose. When I came into the hold, I washed off my oil clothes and passed the hose.

XQ. The oilskins you were wearing? A. Yes, sir. He said, "Pass the hose."

XQ. You passed it to him? A. I said, "Just a minute, Max."

XQ. Did you stay on deck then for a while? [14] A. I washed off and passed the hose to Mr. Hauff. I went forward, kept on going forward.

XQ. Do you remember whose job it was to wash down the deck of the fish that day? A. In general the guy that works on deck washes the deck.

XQ. Do you know who it was? A. No, sir.

XQ. Somebody spoke up and said he would do it, is that what you mean? A. No. The man knows his job, everybody knows his job, what he has to do.

XQ. Well, how long did you stay on deck after you passed Mr. Hauff the hose? A. Just while I was walking forward, about a minute, maybe two.

XQ. Were there other men in the forecastle when you went forward? A. That I could not say, at the present.

XQ. What did you do, change your clothes? A. Yes, sir.

XQ. How long did that take, five or ten minutes? A. I should say five to ten minutes, not too long.

XQ. What did you do, go out on deck to go ashore? A. I came up the forecastle on deck, started to go ashore, yes, sir.

XQ. So that from the time you passed Mr. Hauff the hose, it was [15] something like six to ten, six to eleven minutes before you started to go ashore? A. That could be. I do not know the exact time.

The Court: Less than an hour.

The Witness: Yes, sir.

The Court: Less than half an hour?

The Witness: Yes, your Honor, less than half an hour.

XQ. It was about five to ten minutes, you just took time to go in and get dressed, come out and go home? A. You most generally take off your oil clothes, you wash your hands, you wash your face, you change your clothes, take off your working clothes, get into your dress coat, as we call it.

XQ. And then when you came out on deck, what did you see? A. Mr. Hauff.

XQ. What was he doing? A. He was around the hatch, the forehatch.

XQ. What was he doing? A. Working on some fish, as far as I knew.

XQ. Cleaning them? A. I guess so.

XQ. There was no one else on deck then? A. No, I didn't see nobody else on deck.

• • •

[1] MAX H. HAUFF

Cross-examination by Mr. Whipple

XQ. Who decides who will be the man on the dock? A. That is up to the gang, up to the crew of the boat.

XQ. The mate does not say anything about it, does he? A. No.

XQ. The mate does not tell you how you are going to unload your own spawn, does he? A. No, sir.

XQ. The captain does not either, does he? A. No.

XQ. From your point of view they have no right to tell you, isn't that right?

Mr. Katz: Objection.

The Court: His point of view? He is testifying to custom. He may testify as a matter of law. He does not seem to be a lawyer.

XQ. When did you last talk over this case with anybody, Mr. Hauff? A. Yesterday.

The Court: Did you talk with anybody while you were having coffee this morning?

The Witness: Yes, your Honor.

The Court: That is the last time.

[2] XQ. Who was it you were talking with, Mr. Katz? A. Yes, sir.

Mr. Katz: This morning?

The Witness: That was yesterday.

XQ. You were in his office yesterday? A. I have been by the office.

XQ. When was the last time you talked with Mr. Katz before that? A. That was, I think it was early this year.

The Court: Some months ago?

The Witness: Some months ago.

Mr. Whipple: This year?

The Witness: This year.

XQ. When did you first decide there was slime on the rail? A. I did not decide that.

XQ. When do you first remember that you saw slime on the rail? A. When I walked down the dock.

XQ. Well now, do you remember the mate coming to see you and asking you about this accident? A. Yes, sir.

XQ. And he took a statement from you, didn't he? A. Yes, sir.

XQ. And you signed it, didn't you? A. Yes, sir.

XQ. It is your signature, isn't it? A. That is right.

[3] XQ. Those are your initials on the first page? A. That is right.

XQ. And you said partly:

"After he slipped he got his feet on the rail and then went back up the ladder. He did not come back on the boat."

Is that right? A. Yes, after he went up the second time.

XQ. He had his good shoes on and was dressed up to go ashore? A. Yes, sir.

XQ. "The rail must have been slippery." Is that what you said? A. I do not know.

XQ. You signed it, didn't you?

"It was early in the morning and cold."

Was it? A. It was clear weather.

XQ. "It might have been icy." Did you say that? A. No, I don't—

XQ. You said you signed it, didn't you? A. Not in April.

XQ. Did you sign the statement? A. Yes, sir.

XQ. But you would say now you did not say that it might have [4] been icy? A. No.

XQ. And this was on October 25, 1957, only six months after the accident, is that right?

The Court: The witness shakes his head affirmatively.

The Witness: I don't remember.

XQ. It wasn't raining, a good morning? A. Yes, sir.

XQ. It might have been raining before that? A. I don't remember.

XQ. There might have been water coming off the dock but I don't remember whether there was or not. Did you say that to him? A. I don't remember.

XQ. Do you remember now? The truth is, Mr. Hauff, you don't remember whether there was anything on the rail or not, do you?

The Court: Is the truth you do or do not remember?

The Witness: Yes, sir.

The Court: Which is it?

The Witness: I remember when I come down from the dock.

The Court: What do you remember?

The Witness: I remember I almost slipped myself.

The Court: That is not really the point.

Mr. Whipple: May I go on for a minute?

The Court: Yes.

XQ. Did you say you had some trouble getting on the boat yourself? [5] Is that what you mean? A. Yes, sir.

XQ. Well now, on April 18, 1958, somebody else came to see you about this accident, didn't they?

The Court: April 18, 1958.

Mr. Whipple: Yes, sir.

XQ. Just only six months ago, four months ago? A. Yes, sir.

XQ. You signed another statement, didn't you? Isn't that your signature? A. Yes, sir.

XQ. And in this statement you said, "I do not know if there was any slime or spawn on the rail or not." So that back in April you didn't know whether there was any slime or spawn, did you?

The Court: What is the answer?

The Witness: Yes.

XQ. You told this man—you didn't tell him the truth?

The Witness: No, it is true but I had such a short time, it happened five minutes before the boat sailed. I tried to get rid of the man, he was bothering me much. I just signed the statement.

XQ. "When I went back aboard, I didn't have any trouble."

Did you tell him that? [6] A. I don't remember.

XQ. "I went back about 7:30 a.m."

Is that right? A. Just about.

XQ. "We started to take out, about 7 or 7:10 a.m."

Is that right? A. I don't remember.

XQ. You don't remember now? A. The statement there.

XQ. Is it so? A. Exactly the time, I did not look. We have the Custom House, we always look at the Custom House. I never looked at the Custom House clock. We can see the Custom House clock. I do not know exactly the time.

XQ. You do not know what time it was now, is that right? A. I really did not look at the Custom House clock.

XQ. You told him, "I helped take out the spawn that morning." A. Yes, sir.

XQ. "I was on the dock."

A. Yes.

XQ. "He cleaned up the watch."

A. Yes.

XQ. "I do not know if there was any spawn or slime on the rail or not."

Did you tell him that. [7] A. I don't remember.

XQ. You don't remember.

Mr. Whipple: No further questions.

Redirect Examination by Mr. Katz

Q. Mr. Hauff, where were you when this man, whoever it was, came down to see you the first time? A. I was on board the RACER, ready to sail.

Q. Did you have much time to talk to him?

Mr. Whipple: Objection, your Honor.

The Court: Well, he may answer that. Did you have much time to talk to him?

The Witness: I had about ten minutes, your Honor.

Q. Where were you the second time? Was it the same man, by the way? A. I think it was the same man, I am not sure.

Q. Did he tell you why he had to come back and get another statement from you? A. No. He said he—

The Court: If he did not, just say No.

The Witness: No.

Q. And on the second occasion how much time did you have to talk to him? A. We was ready to sail. I got my gloves and my cigarettes to go out fishing. He was on board the boat again, at the same time.

[8] Q. The fact of the matter is that on both these occasions you were not too particular what you told him, isn't that so? A. Yes, sir.

Q. You were just trying to get rid of him, as you said? A. Yes.

The Court: You were agreeing with everything he said, in the way you are agreeing with the lawyer now?

The Witness: No, your Honor.

Q. Did you read the statement? A. No, I did not read the statement but the man read it before me. I remember that.

Q. And you signed it? A. I signed it.

Q. How long after that on each occasion did the boat sail? A. At about five minutes on the first.

Q. Did the man go out fishing with you? A. No, we even had to wait, to let him to on shore.

Mr. Katz: I have no further questions.

* * *

[1] JOSEPH C. McNAMARA, Sworn

Direct Examination by Mr. Whipple

Q. Your name, sir? A. Joseph C. McNamara.

Q. And your address? A. 26 McCall Street, Medford, Massachusetts.

Q. And your occupation? A. Master of fishing trawlers.

Q. On April 1, 1957, whether you were the master of the trawler RACER or not, sir? A. That is right, sir.

Q. And that is the day that Mr. Mitchell was injured, sir? A. That is right.

Q. Were you there? A. No, sir.

Q. Had you left the vessel? A. That is right, sir.

Q. Where had you gone? A. I went home, when we got in after midnight, I would come back the next morning but not aboard the vessel.

Q. What was the purpose for which you returned to the Fish Pier? A. To take care of the equipment of the boat, such as wire and rollers, gear, net sections.

Q. With whom do you deal for that purchase? [2] A. We deal mostly with Charles Starrett, that is, O'Hara Brothers, they have a gear place. Sometimes we get odds and ends from Mr. Westerly.

Q. You yourself were ordering these things, talking to somebody about them? A. I order them myself. I also turned in a requisition.

The Court: We are not interested in the purchasing operations.

Q. What does the mate do, sir, on the day of the unloading? A. The mate—

Mr. Katz: If your Honor please, has he qualified?

The Court: Of course, he is. As a captain he assigns people to their jobs. He can tell us what the man is supposed to do. There is nobody better qualified than what

he is to tell us what people are ordered to do. What is the job of the mate?

The Witness: The mate's job, when we start to land the fish, he tares them out and keeps run of how much fish comes out of her. He has a voucher for each cart, each trailer, whatever the tab may be.

Q. Is that all? A. That is it.

Q. When he is through with that, he goes home or does whatever he wants? A. That is right. After the stock is settled up, they get [3] together on how much. We also have a commission man, they always have a commission man.

Q. Whether or not, sir, you have anything to do with the saving of the spawn or the catch of spawn? A. Nothing, I have nothing to do with it.

Q. By custom whether or not you give any orders with reference to that? A. The only orders I will give, if the crew wants to save spawn and they have ambition enough to get down in the corner and save it, to make a buck for themselves, it is up to them.

Q. Is there anything about the time it should be removed, sir? A. Say that again, please?

Q. I asked if there was anything about the time or place or storage or time it is removed from the vessel? A. Well, the time, I asked them to have it out before we start to land the trip of fish. The place of storage, if there is room in the bottom of her anywhere, they can put it.

Q. You don't share in the profits or the money received from the spawn? A. No, sir.

Q. How is that spawn sold, sir? A. Well—

Q. If you know. A. It used to be sold, I believe, the first of April, in the year you mentioned it used to be sold, men would come down to [4] the dock with a truck and buy it from the crew but that has been changed.

The Court: We do not care about the present situation. We only care about April 1957.

The Witness: That finishes that.

Q. The men get the money, one man gets the money? A. Gets a check, I understand, from the Exchange. Now he does. At that time he got it from the guy on the truck.

Q. That person, whether or not he had any connection with the vessel owner? A. Well, I don't believe so.

Q. What is that? A. I don't believe so.

Q. Do you know whether or not he works for himself? A. The man that buys?

The Court: There is no suggestion that the purchaser was acting for the owner. Mr. Katz admits he was not.

Q. We took a deposition, Captain, from Mr. Miller. He was the mate, wasn't he, on that trip? A. That is right.

Q. By the way, do you remember who the mate was on the trip before? A. I do not.

Q. Do you remember whether it was Mr. Mitchell? A. I don't remember but I know that Mr. Mitchell did make a voyage with me as mate. I do not know whether it was the [5] trip before or not.

Q. Did you give Mr. Mitchell any different instructions from those you give every other man? A. No, sir, not that I remember.

Q. Well now, when we were asking questions of Mr. Miller, I asked him this question:

> "You never said anything to the men about the spawn, whether they could or could not do it, did you?"

And his answer was:

> "To tell you the truth, I would not dare, I would not dare, if you told them they couldn't have it, you would not have a man sailing the boat. That is the custom. Sometimes you will have a broken trip, when

the fellows get that spawn money it makes up for the trip."

Is that answer true, sir?

Mr. Katz: Objection, your Honor, he is asking him to comment on the testimony.

Mr. Whipple: I am asking for his observation.

The Court: Overruled. Is that a correct answer in your understanding of the facts?

The Witness: I had it a little bit mixed up. You say Mr. Miller said—

Mr. Whipple: He said this, do you want me to read it [6] again?

The Witness: Please.

Q. "To tell you the truth, I would not dare."

I will go back and read the question for you.

The Court: The question is whether the mate has any authority over the spawn. Ask him directly.

Q. Does he? A. No, he has no more authority over it than I have.

* * *

MEMORANDUM

October 31, 1958

WYZANSKI, D.J.

In this case I made a statement in my charge to the jury which I believe ought to be supported by a brief memorandum.

In effect I said that the plaintiff could not recover unless the slime had been on the rail long enough for the shipowner to be chargeable with knowledge of it. No one would doubt that this was a correct charge with respect to the negligence count, but it might be argued that the charge was inappropriate with respect to the unseaworthiness count. If such an argument should be made, there are two independent answers.

First, there should have been a directed verdict for the defendant on the unseaworthiness count. If there were slime on the rail, it was put there by an associate and joint-venturer of the plaintiff and not by a stranger or by anyone acting for the defendant. If Sailor A and his wife go on board, and each of them has a right to be there, but they are engaging in a frolic of their own, not intended for the profit or advantage of the shipowner, say, for example, that they are munching taffy, and the wife drops the taffy on the deck, and the sailor slips on it, the sailor, if he is injured, is not entitled to collect damages from the shipowner. In short, absolute as is the liability for unseaworthiness, it does not subject the shipowner to liability from articles deposited on the ship by a co-adventurer of the plaintiff.

Second, even if it were true that in some cases a shipowner may be liable on the theory of unseaworthiness for injuries attributed to articles deposited on the ship by one who at the time of the deposit was acting as an associate and joint adventurer of the plaintiff, such possibility of liability does not arise *instanter* following the deposit. A reasonable period of time must elapse to allow the defendant shipowner to discover the deposit. Cases which appear to sustain a shipowner's liability for accidents due to foreign substances deposited upon the deck without the shipowner's knowledge or even his opportunity to know are in every instance, so far as this Court is aware, cases where the deposit was made either by a stranger or by a person who at the time he made the deposit was acting either by virtue of agency or independent contract on behalf of the shipowner. Such authorities are irrelevant where the deposit was made by a person who (regardless of his formal employment payments) was at the time of the deposit the agent for and only for the plaintiff.

(s) C. WYZANSKI

United States District Judge

DEFENDANT'S REQUESTS FOR INSTRUCTIONS

"2. If the jury shall find that the plaintiff was engaged in an enterprise for his own profit and for which the vessel owner, the captain and the mate were not to be compensated in any way and if the jury shall find that his injury was caused by another person engaged in the same activity, then the jury should find for the defendant on Counts I and II of the plaintiff's Bill-of-Complaint.

* * *

7. If the jury shall find that the plaintiff and the other person unloading the spawn from the vessel were performing this work on their own account, for their own pay, and on their own time, then the jury should find for the defendant on Counts I and II of the plaintiff's Bill-of-Complaint."

CHARGE TO THE JURY

* * *

(16) Mr. WHIPPLE. I want exceptions to my request for rulings.

The COURT. Which one? You cannot do it by blanket----

Mr. WHIPPLE. Number 2.

* * *

The COURT. Denied.

* * *

STENOGRAPHIC RECORD OF TRIAL

* * *

Frank C. Mitchell, Sworn

* * *

(28) Cross-examination by Mr. Whipple

* * *

XQ. And you as a crew member have an agreement with the owner that you may have the fish spawn for yourself with the other members of the crew; isn't that true? A. Always did have the spawn, the crew members.

* * *

PROCEEDINGS IN COURT OF APPEALS.

On March 4, 1959, this cause came on to be heard and was fully heard by the Court, Honorable Calvert Magruder, Chief Judge, and Honorable Peter Woodbury and Honorable John P. Hartigan, Circuit Judges, sitting.

Thereafter, on April 7, 1959, the following opinion of the Court and concurring opinion were filed:

[fol. 55]

IN UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5429.

FRANK C. MITCHELL, Plaintiff, Appellant,

v.

TRAWLER RACER, INC., Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

[167 F. Supp. 434]

Before MAGRUDER, Chief Judge, and
WOODBURY and HARTIGAN, Circuit Judges.

Morris D. Katz for appellant.

James A. Whipple for appellee.

OPINION OF THE COURT—April 7, 1959

MAGRUDER, *Chief Judge*. The amended complaint in this case, filed on the law docket of the United States District Court, sought damages for personal injuries sustained by a member of the crew of the fishing vessel RACER when he lost his footing while leaving the vessel due to the presence, as claimed, of some slimy substance. Count I of the amended complaint was based upon the Jones Act (41 Stat. 1007) and charged that the accident was caused by various acts of negligence on the part of the shipowner or members of the crew. Count II was "brought under the General Maritime Law for Unseaworthiness." Count III claimed $5,000 [fol. 56] damages for the expenses of maintenance and cure. The trial judge left all three counts to the jury, which returned verdicts for the defendant on Counts I and II and for the plaintiff in the sum of $2,500 on Count III. On October 2, 1958, judgment was entered pursuant to the verdict.

Plaintiff duly took an appeal from "that portion of the Judgment entered on October 2, 1958, relating to Count II

of the Plaintiff's Amended Complaint, the said Count II being based upon the unseaworthiness of the defendant's vessel." In charging the jury, over plaintiff's objection, the trial judge had treated Count II based on unseaworthiness (confessedly relating to the same accident as was covered by Count I) as requiring proof of the presence of the unseaworthy condition for a sufficient length of time, from which the inference might be drawn that defendant, or his servants, in the exercise of due care, ought to have discovered the presence of the slimy substance and removed it. In other words, as the district court put the issue of unseaworthiness to the jury, he asked them to find whether as a matter of fact there was a slimy substance on the rail of the ship, and if so "was it there for a reasonably long period of time so that a shipowner ought to have seen that it was removed?". Appellant contends that this was a misdirection of law; that damages caused by unseaworthiness are recoverable without fault, and independent of negligence; and that at the moment the slimy substance appeared on the rail, the vessel, or its equipment, became unseaworthy, with the result that there remained to be considered by the jury under Count II, assuming that the jury believed the slime was there, only the question whether this unseaworthy condition was a proximate cause of the plaintiff's injury.

At the outset, we think we ought of our own motion to take note of a possible lack of jurisdiction in the district court sitting as a court of law with a jury, not as a court [fol. 57] of admiralty. See *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149, 152 (1908). Though there was no diversity of citizenship to give jurisdiction to the district court under 28 U.S.C. § 1332, the complaint was properly filed under what had been the interpretation by this court in *Doucette* v. *Vincent*, 194 F.2d 834, 839 (1952), of the jurisdictional provisions of 28 U.S.C. § 1331. But our holding in that case has recently been disapproved by the Supreme Court in *Romero* v. *International Terminal Operating Co. et al.*, decided February 24, 1959. Therefore, no longer can it be asserted that there was an independent basis of jurisdiction under 28 U.S.C. § 1331 which would authorize the district court with jury to entertain a complaint based on

unseaworthiness as provided in the general maritime law. The same might be said for Count III, for maintenance and cure, though that count is not now before us.

However, as counsel for appellant has pointed out, the district court, despite the lack of diversity of citizenship, had jurisdiction of Count I, a substantial cause of action based upon the Jones Act, so that, pursuant to the actual holding in the *Romero* case, that court thereby acquired a "pendent" jurisdiction of the related claims under the general maritime law growing out of the same acts.

The Supreme Court has applied the doctrine of "pendent" jurisdiction to a case where the pendent or ancillary cause of action was the creation of state law. *Hurn* v. *Oursler,* 289 U.S. 238 (1933). The present is indeed an a fortiori case for the application of the "pendent" doctrine, for here, although the same considerations favor a consolidated action, there is no problem at all of federal-state relations, and the substantive law to be applied to Count II is federal law, that is, the general maritime law as understood and applied in the United States and as formulated, ultimately, by the Supreme Court of the United States. Compare *Massachusetts Universalist Convention* v. *Hildreth &* [fol. 58] *Rogers Co.,* 183 F.2d 497 (C.A. 1st, 1950), where the pendent claim, which the federal court had "jurisdiction" to entertain, was a state-created claim; we held there that the district court did not commit an abuse of discretion in dismissing the pendent claim without prejudice, it having dismissed the "substantial" federal claim as a matter of law, upon a preliminary motion to dismiss. In a case like the present one, even if the district court had been able to dispose of the federal claim under the Jones Act without trying any issues to the jury, dismissal of the "pendent" claim would hardly have been justified. In view of the fact that the "pendent" claim here, under Count II, is a federal maritime claim, which the district court certainly had jurisdiction to entertain and determine as a court of admiralty, the most that the district court could have done after dismissing the Jones Act count would have been to transfer the remainder of the case to the court's admiralty docket, there to be determined by the admiralty judge

sitting without a jury. See *Jordine* v. *Walling,* 185 F.2d 662 (C.A. 3d, 1950).

Where the "pendent" claim is cognizable in a court of admiralty, under the general maritime law, it may well be that the parties do not have a constitutional right to a jury trial of the issues under Count II on the law side of the docket merely because the pendent claim is joined with a claim under the Jones Act. See *Romero* v. *International Terminal Operating Co.,* supra; *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, 415 Note 1 (1953) (concurring opinion). But we do not have that question to decide in this case. The district court has not undertaken to deprive the seaman of a jury trial on the issues involved in Count II. On the contrary, the court in fact submitted to the jury the whole case, that is, the issues involved in all three counts, and entered judgment on all counts in accordance with the jury verdict, including the two counts on which [fol. 59] it had, on the law side, only a "pendent" jurisdiction. See *Strachman* v. *Palmer,* 177 F.2d 427, 431 (C.A. 1st, 1949). We could hardly say that this action constituted an abuse of discretion, considering the broad discretion confided to a district court in the order of trial and determination of claims over which it had an undoubted jurisdiction either direct or "pendent," even if there had been an objection made to the trial by jury (which there was not).

The very policies and advantages which dictate the consolidation of the two types of claims in one trial would seem also to dictate that separate functions of fact-finding not be allocated to the jury and to the judge. To decide the negligence claim, the jury would have to find all the facts necessary to decision on the other counts (and perhaps more). It would indeed be a most unseemly administration of justice if the facts found by the jury under Count I—the Jones Act claim—should in any respect be inconsistent with findings of fact made by the judge, on the admiralty side, in consideration of Count II. Simple economy of effort and efficient administration of justice prove the propriety of what the district court did here: submitting the whole case to the jury, and entering judgment on all counts in accordance with the jury's verdict.

For the foregoing reasons we must reach the merits of this appeal, a result, as it turns out, coinciding on the facts of this case with the result we would have reached had the district court had an independent basis of jurisdiction over Count II under 28 U.S.C. § 1331, which we had erroneously supposed to be so in *Doucette* v. *Vincent*, supra, 194 F.2d at 839.

Due to the peculiar nature of the seaman's calling and his generally helpless condition, he has sometimes been described as "a ward of the admiralty." *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 103 (1944). As a result, certain rules of law have grown up in his favor as part of the [fol. 60] "general maritime law." Thus it is unquestionably true that, when a seaman suffers injury in the service of his ship, the ship or the shipowner owes him an obligation of "maintenance and cure," whether or not his injury may have been produced by anybody's fault, short of gross or willful misconduct on the part of the seaman himself. See *The Osceola*, 189 U.S. 158, 175 (1903). This may be said to be a kind of judicially created Workmen's Compensation Act, with a limitation in the number of items recoverable.

When it comes to an unlimited right of indemnity, over and above "maintenance and cure," for injuries caused by breach of the shipowner's obligation to supply a seaworthy vessel, an obligation sometimes said to be based upon an implied warranty of seaworthiness (see *Mahnich* v. *Southern S.S. Co.*, supra, 321 U.S. at 101), cases can be found which seem to say that the liability thus imposed is a species of liability without fault, not dependent upon proof of negligence or other fault. See *Mahnich* v. *Southern S.S. Co.*, supra, 321 U.S. at 103; *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U.S. 85, 94-95 (1946); *The H. A. Scandrett*, 87 F.2d 708, 710 (C.A. 2d, 1937); *Kulukundis* v. *Strand*, 202 F.2d 708, 710 (C.A. 9th, 1953). See also Woodbury, J., in *Doucette* v. *Vincent*, supra, 194 F.2d 834, 838.

Just how this form of statement got in the books we are not quite sure. So far as we can find, one of the first instances in which a court referred to the shipowner's obligation in respect of seaworthiness as being "absolute" or as a kind of liability without fault is the opinion by Augustus N. Hand, J., in *The H. A. Scandrett*, supra, 87 F.2d

at 710.* Judge Hand stated that he thought this conclusion [fol. 61] followed from what the Supreme Court had said in *The Osceola,* 189 U.S. 158 (1903). The Court (at p. 175) did make the unqualified statement, by way of dictum: "That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff* v. *Metcalf,* 107 N.Y. 211." We say the statement is a dictum, because it was nowhere claimed in *The Osceola* that an unseaworthy condition of the vessel had existed or come into being, and it may be this is the reason why the Supreme Court found it unnecessary there to discuss specifically any possible qualifications as to the basis of the shipowner's liability for unseaworthiness. The New York case referred to in the quoted language was simply one in which the shipowners were held liable for the proven negligence of the mate in failing to supply a seaman with necessary medical attendance and care. Since the shipowner has a non-delegable duty in that respect, it followed that the member of the crew to whom he had delegated the performance of the duty "stands as the agent and representative of the owners and his negligence is theirs." (107 N.Y. at 216) In other words, although, as recognized in *The Osceola,* 189 U.S. at 175, all the members of the crew are fellow servants and hence, under the general maritime law, prior to passage of the Jones Act, seamen could not "recover

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* In the earlier case of *Sabine Towing Co., Inc.* v. *Brennan,* 72 F.2d 490 (C.A. 5th, 1934), it was stated that the duty of the shipowner "as to injuries, for which the general maritime law provides recovery, is absolute. Its breach without regard to negligence makes the owner liable for such losses." Notwithstanding this, the court goes on to say (at p. 494): "We think it quite clear that when an owner buys an old tug, licensed coastwise, and equips it for ocean going, it is negligence to send it out without knowing something of its stability, and especially to send it out without such tests, when as in this case its history and performance in regard to crankiness and tenderness is a matter of official record." See also the statement of McReynolds, J., in *Carlisle Packing Co.* v. *Sandanger,* 259 U.S. 255, 259 (1922).

for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure," nevertheless there may be recovery of [fol. 62] an indemnity against the shipowner for injuries in consequence of unseaworthiness, even if that unseaworthiness may have been brought about by negligence of one of the members of the crew.

In none of the subsequent Supreme Court cases cited by Judge Hand in *The H. A. Scandrett* is there any considered discussion of the basis of liability for injuries resulting from unseaworthiness.

As appears above, in *The Osceola* the Supreme Court said that, both by English and American law, the owner is liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship. By the general maritime law as applied in England, apart from statute, it was originally held that, independent of an express contract or personal negligence by the shipowners, a seaman had no right to indemnity for injuries caused by unseaworthiness. *Couch* v. *Steel,* 3 El. & Bl. 402 (Q.B. 1854). However, by the Merchant Shipping Act of 1876, 39 & 40 Vict. c. 80, § 5, it was provided as follows:

> "[T]he owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same."

This statutory liability, the only basis of the indemnity by the law of England, is thus based upon a lack of due care. And it appears that the dictum in *The Osceola* only states the existence of a similar liability in American law.

It is certainly true that in many of the lower court cases, some of which are cited by the Supreme Court in *The Osceola,* the shipowner's obligation, in respect of seaworthi- [fol. 63] ness, is based upon negligence. Thus, in *The Waco,* 3 F.2d 476, 478 (E.D.Pa. 1925), it is stated: "A vessel must be in all respects seaworthy, which is equivalent of the

common-law duty of providing a servant or employee with a safe place to work." If that is so, then the duty of a shipowner is only a duty of care. See Restatement (Second), Agency §§ 492, 493 (1958). In our case of *Christopher* v. *Grueby*, 40 F.2d 8 (C.A. 1st, 1930), liability of a shipowner for injuries resulting from a dangerous condition of unseaworthiness in the engine room was said to be based upon the negligence of the owners in failing to provide and equip a seaworthy vessel. This court said (at p. 12):

> "The duty of ship owners to their seamen to see that their ship is seaworthy and her equipment in safe condition for use when she starts on a voyage is a personal one, *responsibility for which they cannot escape by delegating its performance to another.* In this respect it is like the common-law duty of a master to provide his servant a suitable place in which to work. And a seaman injured through failure to perform this duty is entitled to compensation."

In *Storgard* v. *France & Canada S.S. Corp.*, 263 Fed. 545, 547 (C.A. 2d 1920), an injury was caused to a seaman by a certain bolt, which had become worn and defective, and it was held that "the shipowners knew or ought to have known the fact." And at p. 548: "Employers of seamen may not be insurers, but a much higher degree of care must be required of them than is required of shore servants." In *Gerrity* v. *The Bark Kate Cann*, 2 Fed. 241 (E.D. N.Y. 1880), Benedict, D.J., held the ship liable for personal injuries caused by the insufficient and careless manner in which the ship's crew had stowed dunnage in the between-decks, thus creating an unseaworthy condition subjecting [fol. 64] the members of the crew to an unsafe place to work. See the discussions in *The Noddleburn*, 28 Fed. 855 (D.Ore. 1886); by Mr. Justice Gray in *The A. Heaton*, 43 Fed. 592, 593 (C.C.D.Mass. 1890); and by Addison Brown, D.J., in *The Frank and Willie*, 45 Fed. 494, 496 (S.D.N.Y. 1891). See also *Wm. Johnson & Co., Ltd.* v. *Johansen*, 86 Fed. 886 (C.A. 5th, 1898). See generally Tetreault, "Seaman, Seaworthiness, and the Rights of Harbor Workers," 39 Cornell L. Q. 381, 386-403 (1954). In *International Mer-*

cantile Marine Co. v. *Fleming,* 151 Fed. 203, 204 (C.A. 2d, 1907), we find: "It is the duty of the master not only to provide suitable machinery, means and appliances to do the required work, but to use due care to keep them in repair." In *Wholey* v. *British & Foreign S.S. Co.,* 158 Fed. 379, 380 (E.D.N.Y. 1908), the court said:

> "The owner of a vessel must furnish a stevedore employed upon his vessel a safe place to work, in so far as the construction of the vessel and its various parts is concerned, and the inspection and care of these parts is bound to have been such that no hidden defect (which was or should have been known to the officers of the vessel) is allowed to exist and to continue without warning to the stevedores. This, of course, does not include a latent defect that a reasonable inspection by the shipowner or his agents would not show."

The shipowner's duty to furnish and maintain a seaworthy vessel, including equipment and appurtenances, is commonly spoken of as a "nondelegable" duty. See *Globe S.S. Co.* v. *Moss,* 245 Fed. 54, 55 (C.A. 6th, 1917). This surely does not mean that the shipowner may not properly delegate the performance of such a duty to others; it only means that the shipowner sheds no obligations by such delegation, and that, if the duty is merely one of care, [fol. 65] whether he delegates the duty to a servant or to an independent contractor, he must at his peril see that care is used by the person to whom he has delegated the performance of his job. See 2 Restatement (Second) Agency, p. 435, Introductory Note (1958).

We are not under the illusion that an inconvenient controlling precedent can be brushed off merely by an historical demonstration that the precedent was based upon a misunderstanding of earlier decisions. Unfortunately, there may be something in the old saying, "Communis error facit jus." All we say is that, when an appellant urges upon us a proposition of law which we regard as startlingly opposed to principle, we are justified in pointing out that the Supreme Court decisions which seem to have adopted quite casually the rule that a shipowner's obligation to the

seaman to furnish a seaworthy ship is "absolute" and in no degree dependent upon negligence, are all in cases where the unseaworthy condition of the vessel in fact existed at the outset of the voyage; none of them related to a temporary condition of unseaworthiness which had arisen without negligence during the progress of the voyage on a vessel unquestionably seaworthy when it left port.

It may be that in the present state of the law, as declared by controlling authority, a distinction must be made between (1) initial unseaworthiness, existing at the outset of the voyage, where perhaps we have to say that the obligation of the shipowner to furnish a seaworthy vessel is "absolute," and (2) an unseaworthy condition which arises only during the progress of the voyage, in which latter case we take it to be the law that the shipowner's obligation is merely to see that reasonable care is used under the circumstances (which may of course require a high degree of diligence) by him (through the agency of the captain, mate, or other members of the crew to whom he has delegated the obligations of management) incident [fol. 66] to the correction of the newly arisen defect. This distinction is indeed suggested in an opinion by Harlan, C.J., in *Dixon* v. *United States,* 219 F.2d 10 (C.A. 2d, 1955). In the present case, there is no claim that the ship's equipment was in any respect defective at the outset of the voyage. Therefore we do not have to decide now what the liabilities of the shipowner might be in respect of an initial condition of unseaworthiness.

According to the testimony submitted by appellant, he and other deck hands had been engaged in unloading spawn removed from the fish catch, and during the course of the operation some spawn and slime accumulated on the ship's rail. Apparently this slippery substance could not have been there very long before appellant came on deck to go ashore. Acting properly under the unquestioned custom, appellant made his way to the port side of the ship, which abutted the pier, and stepped on to the ship's rail in order to reach a ladder which was part of the pier. He grasped the ladder and was reaching for it with one foot to climb it when his other foot slipped off the rail and he fell, gave

Granting that the presence of the slippery substance at that place created a transitory condition of unseaworthiness, it seems a hard doctrine to say that the shipowner, however great his duty of care, should be liable for injuries occasioned thereby even before he, through persons acting on his behalf, had a reasonable opportunity to discover the defect and remove it. At the oral argument we asked appellant's counsel what the answer would be if a vessel, in all respects initially seaworthy, should be so buffeted in a huge storm that part of its rail, not due to any inherent defect, was washed away (a ship without a rail would certainly be unseaworthy), and if, seconds later, before anyone had had an opportunity to replace the rail, a seaman were washed overboard through this breach in [fol. 67] the rail. Appellant's counsel, recognizing the logic of his position, was obliged to say the shipowner would be liable to the seaman in such a case for an indemnity, over and above the maintenance and cure to which he would be entitled in any event by the general maritime law. Unless and until the Supreme Court tells us that this is indeed the law, we shall continue to believe that it is not so. We associate ourselves with the majority opinion in *Cookingham* v. *United States*, 184 F.2d 213 (C.A. 3d, 1950), cert. denied 340 U.S. 935 (1951). See also *Brabazon* v. *Belships Co., Ltd.*, 202 F.2d 904, 906 (C.A. 3d, 1953); *Burton* v. *Greig*, 265 Fed. 418 (S.D.Ala. 1920), aff'd 271 Fed. 271 (C.A. 5th, 1921); *Adamowski* v. *Gulf Oil Corp.*, 93 F. Supp. 115 (E.D.Pa. 1950), aff'd 197 F.2d 523 (C.A. 3d, 1952); *International Mercantile Marine Co.* v. *Fleming*, supra, 151 Fed. 203, 204 (C.A. 2d, 1907).

It follows that the district judge committed no error, as alleged, in respect to his charge to the jury on Count II.

A judgment will be entered affirming the judgment of the District Court.

WOODBURY, *Circuit Judge* (concurring). Since we do not have to decide the question in this case, I would refrain from expressing so strongly the view that efficient administration of justice requires submission to a jury of [illegible]

ever jurisdiction over that claim on the law side rests upon the joinder with and pendency of that claim with a claim for negligence under the Jones Act. Perhaps in most situations when Jones Act and unseaworthiness claims are joined it would be better to have a jury pass upon both claims at once. But I would leave the district judges free in their discretion to decide the unseaworthiness claim [fol. 68] themselves on the basis of the testimony submitted at a trial by jury of the Jones Act claim. I see no reason why a district judge cannot preside over a jury trial at law and sit in admiralty at the same time and I would leave the way open for a judge to do so if in the exercise of his sound discretion that should seem the appropriate procedure in any particular case. At least, I would not in this case indicate that he ought not to do so if he saw fit.

Aside from this relatively minor matter, I heartily concur in Chief Judge Magruder's excellent and interesting analysis of the law of unseaworthiness. I say this even though in *Doucette* v. *Vincent,* 194 F.2d 834, 838 (C.A. 1, 1952), I did indicate, I am afraid too casually and with too implicit reliance on authority, that liability for unseaworthiness does not depend upon a shipowner's negligence and that the owner's duty to provide a seaworthy ship is a form of absolute duty.

[fol. 69]

IN UNITED STATES COURT OF APPEALS

JUDGMENT—entered April 7, 1959

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

/s/ Roger A. Stinchfield, Clerk.

Thereafter, on April 23, 1959, the taxation of costs was filed, mandate issued and the original papers were returned to the District Court.

[fol. 70] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 71]

SUPREME COURT OF THE UNITED STATES

No. 176, October Term, 1959

FRANK C. MITCHELL, Petitioner,

vs.

TRAWLER RACER, INC.

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.